COPY

FILED
OCT 27 1955
HAROLD B. WILLEY, Clerk

No. 288 Misc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

HARRY C. STEINMETZ, *Petitioner,*

v.

CALIFORNIA STATE BOARD OF EDUCATION, ROY E. SIMPSON, as State Director of Education, and CALIFORNIA STATE PERSONNEL BOARD, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN
Attorney General of the
State of California

RICHARD L. MAYERS
Deputy Attorney General of the
State of California
112 Library and Courts Building
Sacramento 14, California

Attorneys for Respondents

printed in CALIFORNIA STATE PRINTING OFFICE

TOPICAL INDEX

	Page
JURISDICTIONAL QUESTION	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
ARGUMENT	4
I. The decision of the California Supreme Court was based on independent and adequate nonfederal grounds sufficiently broad amply to sustain its judgment and no substantial federal question is involved	4
II. "Petitioner's contentions are broader than the issues presented by the facts presented in the record"	7
III. The facts in this case do not warrant granting petitioner's request that he now be allowed to answer the unanswered questions	9
CONCLUSION	11

TABLE OF AUTHORITIES CITED

CASES

	Page
Bandini v. Superior Court, 284 U. S. 8	7
Garner v. Los Angeles Board, 341 U. S. 716	6
People v. Perry, 212 Cal. 186	7
Peters v. Hobby, 349 U. S. 331	2
Wieman v. Updegraff, 344 U. S. 183	9

STATUTES

California Education Code, Section 20396(e)	3
California Government Code, Section 1027.5	2
California Government Code, Section 1028	2, 5, 8
California Government Code, 1028.1	2, 3, 4, 5

No. 288 Misc.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

HARRY C. STEINMETZ,
Petitioner,
v.
CALIFORNIA STATE BOARD OF EDUCATION, ROY E. SIMPSON, as State Director of Education, and CALIFORNIA STATE PERSONNEL BOARD,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully present the following matters in opposition to the Petition for Writ of Certiorari.

JURISDICTIONAL QUESTION

The petition has failed to present grounds for the exercise of the United States Supreme Court's jurisdiction for the following reasons:

1. The decision of the California Supreme Court (as well as that of the California District Court of Appeal) was based on independent and adequate non-federal grounds sufficiently broad amply to sustain its judgment.

2. There is no substantial federal question involved.

3. The constitutional grounds upon which petitioner relies are not available to him because they are based upon hypothetical propositions not presented by the factual record of this case.

Throughout the proceedings in the California Courts, petitioner continuously indicated that his refusal to answer two of the questions put to him was solely in order to test the constitutionality of the Luckel Act. (Government Code Secs. 1027.5, 1028, and 1028.1.*) Petitioner has felt aggrieved by the continued refusal of the California courts to reply to his broad-scale attack. The California courts, however, like this honorable court, have followed the wise and sensible rule of reaching constitutional issues last, not first (*Peters* v. *Hobby*, 349 U. S. 331, 338). Petitioner has been unable to recognize that the state of the record in the instant proceedings does not provide him with a vehicle sufficiently equipped to reach the many constitutional grounds asserted.

STATEMENT OF THE CASE

Petitioner, an associate professor at San Diego College, was dismissed by the State Board of Education following his refusal to answer two questions put to him by the board concerning membership in the Communist Party. The questions were: "Are you knowingly a member of the Communist Party?" and, "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" The questions were asked pursuant to Government

* (All statutory references hereafter are to California Code sections.)

Code Section 1028.1,[1] and the dismissal for refusal to answer was required by Section 1028.1.

Petitioner appealed this dismissal to the State Personnel Board which board, after a hearing, affirmed the dismissal and found that petitioner had failed to answer the two questions above quoted and that by reason of said failure petitioner was guilty of a failure and refusal to perform the normal and reasonable duties of his position within the meaning of Section 20396(e)[2] of the Education Code, was guilty of in-

[1] California Government Code Section 1028.1 provides as follows:

"It shall be the duty of any public employee who may be subpenaed or ordered by the governing body of the state or local agency by which such employee is employed, to appear before such governing body, or a committee or subcommittee thereof, or by a duly authorized committee of the Congress of the United States, or of the Legislature of this State, or any subcommittee of any such committee, to appear before such committee or subcommittee, and to answer under oath a question or questions propounded by such governing body, committee or subcommittee, or a member or counsel thereof, relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

"(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

"(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

"(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948.

"Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so propounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

[2] California Education Code Section 20396(e) provides as follows:

"A permanent or probationary academic teaching and administrative employee may be dismissed or demoted and nonacademic employees may be dismissed, demoted or suspended for the following causes:

* * * * *
* * * * *
* * * * *
* * * * *

"(e) Failure or refusal to perform the normal and reasonable duties of the position."

subordination, and was guilty of violating Section 1028.1 of the California Government Code.

Petitioner sought a writ of mandate from the California District Court of Appeal to compel his reinstatement. The court denied the writ (its opinion is attached to the Petition for Writ herein, App. B). Petitioner then sought a writ of mandate from the California Supreme Court. That court also denied relief (a copy of its opinion is attached to the Petition for Writ herein, App. C).

STATEMENT OF FACTS

We adopt the facts as stated in the opinion of the California Supreme Court (see Petition for Writ herein, App. C, pp. 1, 5).

ARGUMENT

I. The Decision of the California Supreme Court Was Based on Independent and Adequate Nonfederal Grounds Sufficiently Broad Amply to Sustain Its Judgment and No Substantial Federal Question Is Involved.

The California Supreme Court was explicit in its refusal to reach the many constitutional issues raised by petitioner. The court made it clear what it was and what it was not deciding. The court reiterated what is now well established, namely, that the Legislature may properly ask a public employee whether he is a member of the Communist Party, knowing merely that he was such a member (Petition for Writ herein, App. C, pp. 6, 7), and determined that this is what the Legis-

lature intended to ask (App. C, p. 6); that this is what was asked (App. C, p. 6); that petitioner understood the question as asked (App. C, p. 5); and, that he refused to answer (App. C, p. 5). The court went to great length to make clear that the dismissal was based not because of membership, innocent or otherwise, in the Communist Party, but because of petitioner's refusal to answer questions as to his membership in the Communist Party (App. C, pp. 7, 8, and 10).

Although the court held that Government Code Section 1028.1 did not violate the provisions of the California Constitution prohibiting the passage of special laws, it specifically stated that it was not determining the validity or applicability of Government Code Section 1028 (App. C, p. 10).[3]

The only federal question that was conceivably involved in the facts presented and in the decision of the California Supreme Court was whether petitioner, as a public employee, could constitutionally be required to disclose his past or present knowing membership in the Communist Party without reference to his knowledge of the character of the organization (or, as it is phrased by petitioner, "membership qua membership"). We submit that this no longer constitutes

[3] Similarly, the opinion of the California District Court of Appeal made it clear that it was determining only (1) whether the State Legislature acted properly in enacting Government Code Section 1028.1; (2) what the word "knowing", as used in the questions asked, meant; (3) whether the questions were relevant; and, (4) whether petitioner answered the questions. Said the District Court: "We are not called upon to do more, and we do no more, than to determine whether or not (petitioner's) refusal to answer these two questions constituted cause for his dismissal. We are not concerned with and do not decide what would be proof of disloyalty in fact sufficient for dismissal upon that ground." (App. B, p. 3.)

a substantial federal question. Petitioner is only traveling a road clearly marked by Pacifico and Schwartz in the *Garner* case. (*Garner* v. *Los Angeles Board,* 341 U. S 716.)

The honorable court stated:

> "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." (341 U. S. at page 720.)

Said Justice Frankfurter concurring in part:

> "But the two employees who were dismissed solely because they refused to file an affidavit stating whether or when they had been members of the Communist Party or the Communist Political Association cannot successfully appeal to the Constitution of the United States." (341 U. S. at page 726.)

Said Justice Burton concurring in part:

> "I agree with the court that the judgment should be affirmed as to petitioners Pacifico and Schwartz. They executed the oath but refused to sign an affidavit calling for information as to their past or present membership in the Communist Party or the Communist Political Association. Such refusal does not now present the question of whether the Constitution permits the City to discharge them from municipal employment on the basis of information in their affidavits. We have before us only the question of whether municipal

employees may be required to give to their employer factual information which is relevant to a determination of their present loyalty and suitability for public service." (341 U. S. at pages 729-730.)

II. "Petitioner's Contentions Are Broader Than the Issues Presented by the Facts Presented in the Record"

(*Steinmetz* v. *State Board,* decision of the District Court of Appeals; see Petition for Writ herein, App. B, p. 3.)

Petitioner's entire argument challenging the constitutionality of the Luckel Act is based upon hypothetical propositions that are unsupported by the factual record in this case.

It is well settled that the courts, including this honorable court, will not give their consideration to questions involving the constitutionality of a statute based upon hypothetical questions not presented by the record before the Court.

> *Bandini* v. *Superior Court* (1931), 284 U. S. 8, 52 S. Ct. 103, 108; *People* v. *Perry* (1931), 212 Cal. 186, 193, 298 Pac. 19.

Thus, the California Supreme Court said,

> "*We need not determine* whether there is any merit in petitioner's attack upon another section of the Luckel Act which provides that it shall be sufficient cause for dismissal when a public employee advocates, or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates,

> the overthrow of the government by force or violence. (Gov. Code, § 1028.)" (App. C, p. 10.) (Emphasis added.)

Similarly, the District Court of Appeal said,

> *"But we are not now discussing, nor are we required here to discuss,* the limitations that must be imposed upon separation from service lest the innocent be discharged as well as the guilty." (App. B, p. 7.) (Emphasis added.)

Yet the only questions raised by petitioner go to the application and validity of Government Code Section 1028. But petitioner's attack on this inapplicable statute rests on nonexistent facts. If, says petitioner, he had answered the questions, and if he had answered them in the affirmative (although he states that if given the opportunity, he would answer them with a categorical "no"), then petitioner would like to know whether, without any further questioning, he would have been dismissed under Government Code Section 1028.

We must emphasize that the California courts have not determined that the Luckel Act or any of its provisions authorize or require the dismissal of a public employee for membership in the Communist Party without reference to his knowledge of the character of the organization. This question has not been decided or inferentially passed upon by any California Court. But more basic is the fact that this issue is not before this honorable court in this case.

III. The Facts in This Case Do Not Warrant Granting Petitioner's Request That He Now Be Allowed to Answer the Unanswered Questions

The *Garner* case does not support petitioner's request that he now be allowed to answer the unanswered questions. In the *Garner* case only those who refused to take the oath, and not those who refused to sign the affidavit, were provided a second chance. And that opportunity was provided them only because the court felt that its interpretation (that scienter was implicit in each clause of the oath) " * * * may not have been explicitly called to the attention of petitioners before their refusal" (341 U. S. at p. 724).

Here, however, we are not dealing with an oath requirement in which one and only one answer would be acceptable. We are dealing with what is, in effect, an affidavit. We are dealing with the right, not to a particular answer, but the right to an answer—the right to information. Petitioner indicated by all of his comments that he was well acquainted with the problems and cases involved in this area. Represented as he was by attorneys who submitted briefs in the *Garner* case, petitioner cannot, and does not, claim to have been ignorant of the holding of the *Garner* case. His statement to the Board of Education shows clearly that he understood the questions put to him. To paraphrase the court's language in *Wieman* v. *Updegraff* (344 U. S. 183) here, with this court's decision in the *Garner* case literally before him, there is no basis in

the instant proceedings for holding that this petitioner may not have understood his obligation to provide the requested information and that he should now be afforded an opportunity to answer the questions.

In addition, it is significant to note that petitioner's request is one that was not made before any California tribunal.

We have no desire to be either harsh or vindictive nor do we oppose inquiry into the construction of the Luckel Act. Had there been, on the part of petitioner, a real and honest confusion as to the meaning of the questions asked, or had the legality of those questions been open to reasonable doubt, we would not so strongly oppose petitioner's request. But here this honorable court is not being asked to provide a second chance for an allegedly confused person, but is being asked to provide a technique for testing constitutional issues which, we respectfully submit, are not presented by the facts in the instant case.

CONCLUSION

Respondent respectfully urges that for the foregoing reasons this honorable court deny the Petition for Writ of Certiorari.

Respectfully submitted,

EDMUND G. BROWN
Attorney General of the
State of California

RICHARD L. MAYERS
Deputy Attorney General
Attorneys for Respondents

o

Office - Supreme Court, U. S.
FILED
NOV 2 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 288, Misc.

HARRY C. STEINMETZ,

Petitioner,

v.

CALIFORNIA STATE BOARD OF EDUCATION, ROY E. SIMPSON, as STATE DIRECTOR OF EDUCATION, and CALIFORNIA STATE PERSONNEL BOARD

****

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

A. L. WIRIN
FRED OKRAND

257 South Spring Street
Los Angeles 12, California

Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 288, Misc.

HARRY C. STEINMETZ,

Petitioner,

v.

CALIFORNIA STATE BOARD OF EDUCATION, ROY E. SIMPSON, as STATE DIRECTOR OF EDUCATION, and CALIFORNIA STATE PERSONNEL BOARD

****

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

I

THE CALIFORNIA SUPREME COURT'S JUDGMENT CANNOT BE SUSTAINED ON NON-FEDERAL GROUNDS; AN IMPORTANT AND SUBSTANTIAL FEDERAL QUESTION IS INVOLVED (Reply to Respondents' Point I, pp. 4-7)

It is difficult to follow respondents' suggestion. The opinion of the court below fairly bristles with decisions on federal constitutional grounds. Thus the court relies upon this court's decisions in Adler v. Board of Education, 342 U.S. 485 and Garner v. Board of Public Works, 341 U.S. 716 (Pet. Appx.C, p. 7), cases clearly decided by this court on federal constitutional grounds, and it attempts to distinguish this court's decisions in Wieman v. Updegraff, 344 U.S. 183, Adler, Garner and Gerende v. Baltimore City Board of Supervisors, 341 U.S. 56, (Ibid, pg. 8) all, also, clearly decided on federal constitutional grounds.

Respondents do not disclose what the non-federal grounds were upon which to sustain the California court's decision.

Moreover, respondents themselves point out the important and fundamental federal constitutional question involved when they pose this question (Br. 5):

> "whether petitioner, as a public employee, could constitutionally be required to disclose his past or present knowing membership in the Communist Party without reference to his knowledge of the character of the organization."

Petitioner from the beginning maintained that to so require disclosure under those circumstances violated the Due Process clause of the 14th Amendment, and the Wieman, Adler, Gerende and Garner decisions of this court. As seen, he was specifically turned down on this issue by both the courts below. (Pet. Appx. B. pg. 8; Appx.C. pp. 6, -8).

Respondents urge (Br. 5) "that this no longer constitutes a substantial federal question" by reason of this court's decision in Garner v. Los Angeles Board, 341 U.S. 716. We agree that the Garner case has great bearing on the issue in this case. Our difference with respondents being that the decision of the court below is in conflict with the Garner decision, as well as with Adler, Gerende and Wieman.

Respondents, we respectfully submit, fail to appreciate, even more than did the respondents in Wieman, what this court had ruled in Garner. The case here is not like the affidavit phase of the Garner case, but rather like the oath phase of that case.

The point is this. In Garner, "the validity of the oath turns upon the nature of the Charter amendment (1941) and the relation of the ordinance (1948) to this amendment." (341 U.S. at 720). This court assumed "that under the Federal Constitution

the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so." (pg. 720) Accordingly, this court held the oath not violative of constitutional right, but only if "scienter is implicit in each clause of the oath." (pg. 724).

This was not the situation as to the affidavit phase of the case. As to this phase there was no provision, comparable to the charter provision relevant in the oath phase, barring from employment persons who are or were members of the Communist Party or the Communist Political Association. Therefore the only thing involved in the affidavit phase was inquiry into matters relevant to fitness or suitability for employment.

In the case at bar, however, as with the oath phase in Garner, there is a provision[1/] (Govt. Code 1028) which bars from public employment persons who are knowingly members of the Communist Party. Accordingly, as with the oath in Garner, "the validity of (the questions asked petitioner and of Govt. Code 1028.1(d), pursuant to which they were asked) turns upon the nature of (Govt. Code 1028) and the relation of (Govt. Code 1028.1(d)) to this (section)." As with the oath phase in Garner, it may be assumed "that under the Federal Constitution (section 1028) is valid to the extent that it bars from the" state's public service persons who are knowingly members of the Communist Party. But, just as with the oath in Garner, precisely because of the presence of that section 1028, questions concerning that membership are only valid under the Due Process Clause if "scienter is implicit in each" of them. For otherwise, as this court made so clear in Wieman, requiring answers to such questions absent the element of scienter (which the court below said was what 1028.1(d) did) indiscriminate-

1/ Indeed two provisions. The other is Govt. Code 20398(a).

ly classifies "innocent with knowing activity and must fall as an assertion of arbitrary power." (Wieman v. Updegraff, 344 U.S. 183, 191).[2/]

Accordingly, therefore, it is clear, that there is a substantial federal question in this case and that it was wrongly decided by the court below.[3/]

II

PETITIONER'S CONTENTIONS ARE NOT BROADER THAN THE FACTS PRESENTED BY THE RECORD (Reply to Respondents' Point II, pp. 7-8)

Like the court below, respondents fall into the error which causes them to make the assertion because, as pointed out above under Point I, they did not apprehend what this court said in Garner. Thus, respondents say (Br. 8) (and they point to no reference to the Petitioner to sustain them) "the only questions raised by petitioner go to the application and validity of Government Code Section 1028." But that is not the case at all. Petitioner repeats here what he said in his petition (pg. 13) that no such direct attack on Government Code 1028 is being made. But

2/ We do not believe that the fact that here the problem is framed by way of the question-answer method, while in Garner and Wieman it was framed by way of an oath, makes any difference. Were this to be the crucial difference, then the very careful constitutional point made by this court in Garner, Adler, Gerende and Wieman, could be thus so simply evaded. We do not believe that the constitutional right to freedom from the assertion of arbitrary power rests on so slender a reed.

3/ Apropos the quotation from Justice Burton's concurring opinion in Garner, set forth by respondents at pgs. 6 and 7 of their reply, is this: in Garner, as to the affidavit phase, this Court said that all that was before it was whether an employee may be required to give an employer factual information relative to a determination of present loyalty and suitability. The answer there was yes. But not answered in Garner, and present in this case, is the question as to whether, where an employee answers all questions asked relative present loyalty and suitability (which petitioner here did), the state can nevertheless discharge him for not answering questions which the state had no right to put, because of their being an assertion of arbitrary power.

the fact that no such attack was or is made, does not justify pretending that the section does not exist, anymore than it could be pretended that the charter provision in the oath phase of the Garner case did not exist. Indeed it is the very presence of the section 1028, and assuming its validity, which makes 1028.1(d), as interpreted by the court below, violative of due process because the court below disregarded the admonition of this Court in Garner that to sustain, there the oath, here the questions, scienter must be present. But it is this scienter which the court below specifically ruled out.

III

THE FACTS OF THIS CASE DO WARRANT PERMITTING PETITIONER TO ANSWER NOW (Reply to Respondents' Point III, pp. 9-10)

In the light of the vigorous and exhaustive dissent by Justice Carter in this case in the court below it is difficult to see the validity of respondents' suggestion that the meaning of the questions or their legality were not open to reasonable doubt. Indeed, in view of the analysis above and of this Court's pronouncements in the Garner, Adler, Gerende and Wieman cases, petitioner is still of the view that absent the scienter requirement, the questions do violate due process. Be that as it may, it cannot be said that the question was or is so clear.

This case is the converse of Garner. There, this Court, sua sponte ordered that petitioner have a chance to take the oath as finally interpreted to include scienter. Here the court should do the same if it finally determines that the questions are valid absent scienter. The basic principles of justice inherent in this Court's ruling in Garner are equally applicable here.

C O N C L U S I O N

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN

FRED OKRAND

Attorneys for Petitioner.